



**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Having reviewed the evidentiary record contained herein, the Workers Compensation Board (Board) finds as follows:

Claimant alleges accidental injury on August 25, 2004, when she was bumped by a co-worker. Claimant's deposition was scheduled to be taken on April 7, 2005, with the appropriate notice being provided as of February 28, 2005. On April 7, 2005, the attorneys appeared at the office of Geoffrey Clark, claimant's attorney. At that time, claimant failed to appear for the deposition. On April 8, 2005, claimant's attorney filed a Motion To Withdraw, citing claimant's failure to contact him and a lack of communication as resulting in his inability to effectively represent her. Said Motion To Withdraw was granted by the ALJ on April 25, 2005.

On April 13, 2005, respondent filed a Motion To Compel Or In The Alternative Motion To Dismiss. This matter then proceeded to hearing before the ALJ on June 6, 2005. At that time, claimant appeared pro se. Claimant advised that she had not been provided proper notice of the deposition, as she had recently suffered a house fire and was living in a different location. As a result of that hearing, the ALJ issued an Order to compel claimant to attend the deposition. Claimant acknowledged at the hearing that she would attend the deposition, requesting at least 30 days notice of the deposition in order to make arrangements with her employer.

Respondent appeals the June 7, 2005 Order of the ALJ which grants respondent's Motion To Compel claimant's attendance at the deposition, suspends claimant's entitlement to benefits pending claimant's attendance at the deposition, but denies respondent's Motion To Dismiss the case in its entirety. Respondent contends the ALJ erred in refusing to dismiss the case pursuant to K.S.A. 44-549 for claimant's refusal or unwillingness to provide a deposition.

K.S.A. 44-549 grants the Director and the Board the power to compel the attendance of witnesses to the same extent as is conferred on district courts in the state of Kansas under the Code of Civil Procedure. Respondent argues that this power implies a right to dismiss cases in the same fashion as performed by district court judges when a party fails to attend a deposition properly noticed.<sup>2</sup>

The Board must first determine whether it has jurisdiction to consider this appeal.

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<sup>2</sup> K.S.A. 2004 Supp. 60-237(b)(2).

K.S.A. 2004 Supp. 44-551(b)(1) grants the Board jurisdiction to review,

All **final** orders, awards, modification of awards, or preliminary awards under K.S.A. 44-534a and amendments thereto made by an administrative law judge shall be subject to review by the board upon written request of any interested party within 10 days. (Emphasis added.)

An issue similar to this was raised in *Shain*,<sup>3</sup> where the Workers Compensation Board determined it did not have jurisdiction from a preliminary hearing to consider the Kansas Workers Compensation Fund's motion to be dismissed from an action. The Court of Appeals, in considering K.S.A. 1995 Supp. 44-551, determined that an order concluding the Fund was not entitled as a matter of law to be dismissed from the case does not relate to an award of temporary total disability or medical treatment and is not a preliminary award under K.S.A. 44-534a.

It is noted that the language of K.S.A. 1995 Supp. 44-551 in effect at the time of *Shain* is different from that in effect in this matter. At that time, K.S.A. 1995 Supp. 44-551(b)(1) stated as follows:

All acts, findings, awards, decisions, rulings or modifications of findings or awards made by an administrative law judge shall be subject to review by the board upon written request of any interested party within 10 days . . . .<sup>4</sup>

The word "final," contained in the current language, was added in 1997. The Board must then determine whether respondent's Motion To Dismiss this matter would constitute a final order.

Generally, a decision or order is final only when it resolves all issues between the parties and reserves no further question for future action. The Kansas Court of Appeals, however, has recognized an exception to this general rule in certain cases where there is no other effective means to review the decision. The court stated three criteria which make an order a final order. The order may be final even if it does not resolve all issues between the parties if the order (1) conclusively determines the disputed question, (2) resolves an important issue completely separate from the merits of the action, and (3) is not effectively reviewable on appeal from a final judgment.<sup>5</sup>

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<sup>3</sup> *Shain v. Boeing Military Airplanes*, 22 Kan. App. 2d 913, 924 P.2d 1280 (1996).

<sup>4</sup> K.S.A. 1995 Supp. 44-551(b)(1).

<sup>5</sup> *Skahan v. Powell*, 8 Kan. App. 2d 204, 653 P.2d 1192 (1982).

Respondent's Motion To Dismiss, having been denied by the ALJ, would not constitute a final order as it could be raised at a future time. However, had that Motion To Dismiss been granted, it would have been a final order under K.S.A. 2004 Supp. 44-551 and would have satisfied the three criteria set forth in *Skahan*. The Board, therefore, determines that it does not have jurisdiction to consider this matter.

Respondent argues in its brief that claimant has failed to attend a second deposition properly noticed and scheduled by respondent at its offices. None of that information was provided to the ALJ. The Board will, therefore, not consider that evidence at this time. The Board is granted exclusive jurisdiction to review the decisions, orders and awards of an administrative law judge based upon questions of law and fact as presented to the administrative law judge. Information not provided to the administrative law judge will not first be considered by the Workers Compensation Board.<sup>6</sup>

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Order of Administrative Law Judge Kenneth J. Hursh dated June 7, 2005, should be, and is hereby, affirmed.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of September, 2005.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Karvette Montgomery, Claimant (pro se)  
John David Jurcyk, Attorney for Respondent and its Insurance Carrier  
Kenneth J. Hursh, Administrative Law Judge  
Paula S. Greathouse, Workers Compensation Director

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<sup>6</sup> K.S.A. 44-555c(a).